Authors Boost Clarity

Stamp Duties: In Action and Reaction

16 September 2014, Tuesday

From tax professionals to professionals in trust companies, academia and legal fraternity, SIATP's ABC session helmed by two esteemed tax lawyers and authors certainly attracted wide interest.

Stamp duty, unlike income tax, is a documentary tax. Duty is paid on the instrument (documents). Without the instrument, case law has shown that no duty is liable.

The Stamp Duties Act (SDA) was dissected at the *Authors Boost Clarity* technical session organised by the Singapore Institute of Accredited Tax Professionals (SIATP) in partnership with LexisNexis. Helming the session were Accredited Tax Advisors Leung Yew Kwong and Tan Kay Kheng, co-authors of the newly launched *LexisNexis Annotated Statutes of Singapore: Stamp Duties Act (Second Edition)*.

Tax professionals had the privilege of gaining invaluable insights on the judgements in various notable cases and a better understanding of Section 15 relief.

The Stamp Duties (Relief from Stamp Duty upon Transfer of Assets between Associated Permitted Entities) Rules 2014, which was touted as possibly one of the most complicated provisions in revenue legislation, was deemed to have come into operation in February 2005. The Rules embody the changes announced at the Singapore Budget over the years. Firstly, the transferee company can now be a foreign company. This means the company may be incorporated outside Singapore or is not a resident in Singapore for tax purposes. The relief earlier given only to companies, is now extended to other entities i.e. statutory boards, unlimited companies and limited liability partnerships.

Secondly, where the transfer is between wholly-owned entities, the consideration may be based on net book value (instead of open market value) and the consideration also be owed by the transferee entity (instead of having to be fully paid at the completion of the transfer). Thirdly, the relief has been extended to include a transfer of interest under any mortgage or debenture.

Another change involves the consideration which can now be in the form of cash, shares in the transferee company or voting capital in the transferee limited liability partnership or a combination of any these forms of capital. Where the transfer is executed in Singapore, the application for relief must be made within 14 days. The period of 30 days applies for transfers executed outside of Singapore. In Singapore, the instrument is typically executed only after an in-principle approval of the application for relief and it must be executed within four months of the grant of in-principle approval by the Commissioner.

Stamp duty relief applies when the transaction is between closely associated entities as the transaction is more an administrative matter than a sale in the ordinary sense. It is thus important to determine the relationship between entities to understand if the relief applies. In determining the relationship between entities, it should be noted that voting capital does not necessarily co-relate with voting power, as can be seen in the Hong Kong case of *Collector of Stamp Duty v Arrowtown Assets Limited (2004)*. In the case, there were substantial non-voting shares, yet that did not satisfy the Hong Kong statutory rules for relief.

Key Terms

To determine the relationship between entities, a thorough understanding of various terms is essential.

Permitted Entity

A permitted entity refers to a company, statutory body or a limited liability partnership (LLP) where the contributed capital of the partnership is entirely held by a company, statutory body, LLP or a registered business trust (RBT). The reliefs involving a transfer of a RBT is however considered under Section 74 instead of Section 15(1)(b). Where the transfer of a RBT satisfies the spirit and structure of the new Stamp Duties Rules, an application may be made for the relief for transfers of RBTs.

Asset

An asset where stamp duty applies refers to immovable property, stocks or interest under any mortgage or debenture held by the entity.

Transferee and Transferor

A transferee entity refers to a permitted entity which can be a company, statutory body, LLP or RBT to whom any beneficial interest in an asset is transferred, conveyed or assigned. A transferor entity refers to a permitted entity by whom any beneficial interest held by it in an asset is transferred, conveyed or assigned.

The first step in determining if reliefs apply is to correctly identify the transferee and transferor of the asset. The next step is to determine if they are associated as only associated entities qualify for reliefs.

Associated Entities, Rule 3(1)(b)

Since 16 January 2014, two entities are considered associated if either of the following conditions applies:

- One of the permitted entities is the holding entity of the other permitted entity, and is the beneficial owner, whether directly or indirectly, of 75% or more voting capital (that is, shares with voting rights) and more than 50% voting power of the other entity.

- A third permitted entity is a holding entity of the two permitted entities and is the beneficial owner, whether directly or indirectly, of 75% or more voting capital (that is, shares with voting rights) and more than 50% voting power, in each of the two permitted entities.

Associated Entities, Rule 3(2)

Where the business structure comprises a chain of one or more entities, Rule 3(2) stipulates that the rules for voting capital and voting power are to be applied throughout the chain to determine the association between entities.

With a better understanding of the fundamentals of SDA, the Act can now be analysed on its application in light of case laws.

Applications and analyses
Similarity between S33A in SDA and S33 in ITA, but Impact Unclear

With the similarity in language between both Sections 33A in SDA and S33 in ITA which pertains to anti-avoidance provisions, the decision in the AQQ case must be considered.

In the AQQ case, the Court of Appeal held that the taxpayer's financing arrangement amounted to tax avoidance within Section 33 of ITA. The section should be read purposively and the intent of the Act must be upheld. The Comptroller had acted *ultra vires* in issuing the additional assessments for the Years of Assessment (YAs) 2004 to 2006 and these were discharged. The Notice of Assessment for YA2007 was however found to be valid.

Unlike Singapore, there is no general anti-avoidance rules (GAAR) in SDA in some countries such as in the Australian states of New South Wales and Tasmania. The rationale lies in stamp duty being a tax on instruments or documents and not transactions and business arrangements.

Stamp Duty in Action and Reaction

Buyer's stamp duty is calculated as 3% less $5,400 for the first $360,000. In *UOL Development (Novena) Pte Ltd v Commissioner of Stamp Duties (CSD) (2008),* the sale to the developer was considered an *en bloc* sale while in *Lai Ling Wan (alias Lily Lai) v CSD (2011),* the purchase of 83 units in a condominium project by an individual was considered as multiple contracts where 83 sale and purchase agreements were signed. This enabled a savings of $5,400 for each of second and subsequent 81 contracts, unlike the former where it was considered as a single purchase.

Interestingly, the above decisions seem incongruent and odd. On the one hand, there were one purchaser (developer) and multiple sellers (unit owners) in the *en bloc* sale, yet it was held that it involved only one contract. On the other hand, there were one purchaser and one seller in *Lai Ling Wan v CSD* but it was held that there were multiple contracts. Both cases also discussed the provisions in Section 33A of SDA.

Application for Adjudication

Buyers who seek the opinion of CSD on duty chargeable may apply for adjudication and subsequently appeal to the High Court within 30 days, if there is a disagreement. This process differs from disagreements in notice of assessments of income tax.

At the Appeal Court, the facts are assumed to be true and there is no questioning of witnesses. The case stated would refer the question of law to the given facts. If the given facts are insufficient, the court can direct an amendment of case stated. This was evidenced in *Doris Cheok v CSD (2010)* where witnesses were not permitted to be called for questioning.

Recent Changes to SDA

There have been recent changes to SDA. There is no need to submit original documents for refund claims and relief has been extended to seller's stamp duty arising from business restructuring in the transfer of industrial properties, and residential and mixed-residential properties.

Looking Ahead

From the developments in recent years, it is clear that a relief may be upheld if transactions fall within the spirit of the relief but may not have met certain conditions. S74 will continue to apply.

What a relief this must be to tax professionals and tax lawyers to understand SDA in action (application).

END.

About SIATP's Authors Boost Clarity series
SIATP's Authors Boost Clarity (ABC) series is designed for accredited tax professionals to gain insights directly from the profession's thought leaders. By collaborating with key publishers, SIATP offers participants at each ABC session the opportunity to seek clarity and gain deeper insights from authors on tax topics they have authored. Over time, the ABC series contributes in boosting the overall tax standards in Singapore.

About Mr Leung Yew Kwong

Principal Tax Consultant, KPMG Services Pte. Ltd.
Accredited Tax Advisor (Income Tax), SIATP
T: +65 6213 2877
E: yewkwongleung@kpmg.com.sg

Yew Kwong is Principal Tax Consultant at KPMG Services Pte. Ltd. since April 2012. Earlier, he was a Partner in the Tax Practice at WongPartnership LLP, and was previously with the IRAS and the predecessor Inland Revenue Department, where he last held the posts of Chief Legal Officer and Chief Valuer concurrently.

He has appeared as Counsel before the Valuation Review Board, Income Tax Board of Review, High Court and Court of Appeal in a number of tax cases.

About Mr Tan Kay Kheng

Partner and Head of Tax Practice, WongPartnership LLP
Accredited Tax Advisor (Income Tax), SIATP
Chartered Tax Adviser, The Tax Institute
Fellow, CPA Australia
T: +65 6416 8102
E: kaykheng.tan@wongpartnership.com

Kay Kheng is a Partner and the Head of Tax Practice in WongPartnership LLP, practising both contentious and advisory/transactional work relating to income tax, stamp duties, property tax and goods & services tax. He has appeared as Counsel in the Singapore Courts as well as the Income Tax Board of Review and the Valuation Review Board.

Kay Kheng holds degrees in law, accountancy and taxation. He sits on the Accounting Standards Council and is a board member of the Tax Academy of Singapore and the SIATP.

This technical event commentary is written by SIATP's Assistant Director, Joanna Wong.